

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

DUSHON NICHALOS GREEN,

Case No. 2:14-cv-01388-APG-NJK

Petitioner,

Order Denying Motion for Reconsideration and Granting Motion to Dismiss

NETHANJAH BREITENBACH,¹ et al..

[ECF Nos. 96, 100]

Respondents.

9 Dushon Nichalos Green, a Nevada prisoner, has filed a counseled Second-Amended
10 Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254. ECF No. 95. There are two
11 motions pending. First, Green moved for reconsideration of a previous order. ECF No. 96.
12 Second, the respondents moved to dismiss the Second-Amended Petition. ECF No. 100. For the
13 reasons discussed below, I deny the motion for reconsideration and grant the motion to dismiss.

I. PROCEDURAL HISTORY

A jury found Green guilty of ten counts of sexual assault, two counts of lewdness with a child under the age of 14 years, two counts of sexual assault with a minor under the age of 14 years, and four counts of sexual assault with the use of a deadly weapon. ECF No. 21-16. Green is serving an aggregate sentence of life in prison with the possibility of parole after 150 years. *Id.* Green appealed, and the Supreme Court of Nevada affirmed on July 31, 2009. ECF No. 23-12.

¹The state corrections department's inmate locator page shows that Green is incarcerated at Lovelock Correctional Center. Nethanjah Breitenbach is the current warden for that facility. Accordingly, at the end of this Order, I kindly request the Clerk of Court to substitute Nethanjah Breitenbach for respondent Tim Garrett. *See* Fed. R. Civ. P. 25(d).

1 Green filed a state post-conviction petition on April 6, 2010. ECF No. 23-14. The state
2 district court denied Green post-conviction relief on August 22, 2012. ECF No. 24-12. Green
3 appealed, and the Supreme Court of Nevada affirmed on May 13, 2014. ECF No. 26-24.

4 Green commenced this action on August 25, 2014, by filing a *pro se* federal habeas
5 petition. ECF No. 1. The respondents moved to dismiss Green's *pro se* petition. ECF No. 14.
6 On February 13, 2017, I granted the motion, in part, (1) dismissing with prejudice "any part of
7 the federal petition [that] can be read as alleging a substantive Fourth Amendment violation,"
8 (2) dismissing grounds 19 and 20 without prejudice, and (3) finding that grounds 1-20 were
9 unexhausted. ECF No. 56. Green moved for a stay, which I granted. ECF Nos. 57, 62.

10 Green filed a second state post-conviction petition on August 3, 2017. ECF No. 76-2.
11 The state district court denied Green's petition on January 18, 2018. ECF No. 76-10. Green
12 appealed, and the Nevada Court of Appeals affirmed on February 14, 2019. ECF No. 76-22.

13 Green moved to correct his illegal sentence on March 26, 2019. ECF No. 76-24. The
14 state district court denied the motion on June 10, 2019. ECF No. 76-28. Green appealed, and on
15 January 30, 2020, the Nevada Court of Appeals affirmed but issued a limited remand for the
16 district court to correct a clerical error in the judgment of conviction. ECF No. 76-33. The
17 district court issued an amended judgment of conviction on February 10, 2020. ECF No. 76-34.

18 On June 30, 2021, this court reopened this matter, and Green filed a *pro se* first-amended
19 petition. ECF Nos. 68, 69. The respondents moved to dismiss the first-amended petition. ECF
20 No. 75. I denied the motion to dismiss without prejudice and appointed counsel for Green. ECF
21 No. 83. Green filed his counseled Second-Amended Petition on October 17, 2023. ECF No. 95.
22 Green raises the following grounds for relief in his Second-Amended Petition: (1) his DNA was
23

1 collected without any lawful basis, (2) his trial counsel stipulated to a harmful fact, and (3) the
 2 trial court failed to sever his cases. *Id.*

3 **II. LEGAL STANDARDS**

4 **A. Fourth Amendment claims**

5 Federal courts are barred from considering a petitioner's Fourth Amendment claims
 6 alleging illegal search or seizure "if he had a 'full and fair opportunity' to litigate his Fourth
 7 Amendment claims in the state courts." *Newman v. Wengler*, 790 F.3d 876, 880 (9th Cir. 2015)
 8 (citing *Stone v. Powell*, 428 U.S. 465, 481 (1976) (holding that "where the State has provided an
 9 opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not
 10 require that a state prisoner be granted federal habeas corpus relief on the ground that evidence
 11 obtained in an unconstitutional search or seizure was introduced at his trial")). This doctrine
 12 applies "whether or not [the claims] were actually adjudicated on the merits and whether or not
 13 they involved an unreasonable application of Supreme Court law or unreasonable determination
 14 of the facts." *Id.* at 878. Thus, "[t]he relevant inquiry is whether petitioner had the opportunity to
 15 litigate his claim, not whether he did in fact do so or even whether the claim was correctly
 16 decided." *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 899 (9th Cir. 1996).

17 **B. Exhaustion**

18 A state prisoner must exhaust state court remedies on a habeas claim before presenting
 19 that claim to the federal courts. 28 U.S.C. § 2254(b)(1)(A). This exhaustion requirement ensures
 20 that the state courts, as a matter of comity, will have the first opportunity to address and correct
 21 alleged violations of federal constitutional guarantees. *Coleman v. Thompson*, 501 U.S. 722,
 22 730–31 (1991). "A petitioner has exhausted his federal claims when he has fully and fairly
 23 presented them to the state courts." *Woods v. Sinclair*, 764 F.3d 1109, 1129 (9th Cir. 2014). To

1 fully and fairly present a claim, a petitioner must present the substance of his claim to the state
2 courts, and the claim presented to the state courts must be the substantial equivalent of the claim
3 presented to federal court. *Picard v. Connor*, 404 U.S. 270, 278 (1971). The state
4 courts have been afforded a sufficient opportunity to hear an issue when a petitioner has
5 presented the state court with the issue's factual and legal basis. *Weaver v. Thompson*, 197 F.3d
6 359, 364 (9th Cir. 1999). A petitioner may reformulate his claims so long as the substance of his
7 argument remains the same. *Picard*, 404 U.S. at 277–78.

8 **III. DISCUSSION**

9 In his motion for reconsideration, Green requests that this court reconsider its February
10 13, 2017, Order dismissing his Fourth Amendment claim with prejudice. ECF No. 96. The
11 respondents oppose Green's motion, arguing that Green's Fourth Amendment claim—ground 1
12 of his Second-Amended Petition—is barred. ECF No. 100. Additionally, the respondents assert
13 that ground 3 is unexhausted. *Id.* I address these arguments in turn.

14 **A. Ground 1**

15 In ground 1, Green alleges that his right to be free from unreasonable searches and
16 seizures was violated when his DNA was collected by his Parole and Probate (P&P) officer for
17 an unrelated offense without a lawful basis. ECF No. 95 at 10. Green explains that prior to the
18 illegal collection of his DNA, there was no connection between him and any of the sexual assault
19 cases that he was charged with in the instant matter. *Id.* at 11.

20 When I dismissed Green's original petition, I held that "[t]o the extent that any part of the
21 federal petition can be read as alleging a substantive Fourth Amendment violation, those
22 allegations are precluded from review by this Court and are therefore dismissed." ECF No. 56 at
23 4 (citing *Stone*, 428 U.S. at 495). Green contends that I should reconsider this ruling because,

1 under *Stone*, he did not have a full and fair opportunity to litigate his Fourth Amendment claim
 2 in state court because the state court never afforded him an evidentiary hearing on the
 3 suppression issue. ECF No. 96 at 5.

4 The Court of Appeals for the Ninth Circuit considered the requisites for a full and fair
 5 opportunity to litigate a Fourth Amendment claim in *Mack v. Cupp*. Using *Townsend v. Sain* as
 6 a guide, the Court of Appeals for the Ninth Circuit explained that a state hearing is not full and
 7 fair if:

8 (1) the merits of the factual dispute were not resolved in the state
 9 hearing; (2) the state factual determination is not fairly supported by
 10 the record as a whole; (3) the fact-finding procedure employed by
 11 the state court was not adequate to afford a full and fair hearing;
 12 (4) there is a substantial allegation of newly discovered evidence;
 13 (5) the material facts were not adequately developed at the state-
 14 court hearing; or (6) for any reason it appears that the state trier of
 15 fact did not afford the habeas applicant a full and fair fact hearing.

16 *Mack v. Cupp*, 564 F.2d 898, 900–01 (9th Cir. 1977) (quoting *Townsend v. Sain*, 372 U.S. 293
 17 (1963)). The court cautioned, however, that:

18 [a]lthough we think that the *Townsend* test must be given great
 19 weight in defining what constitutes full and fair consideration
 20 under *Stone*, we do not believe that it must always be applied
 21 literally . . . as the sole measure of fullness and
 22 fairness. *Townsend* was concerned with the accuracy of the state's
 23 decision making, a consideration that is not relevant to the mandate
 of *Stone v. Powell*.

24 *Id.* at 901.

25 Here, Green moved to suppress the DNA evidence. ECF No. 15-23. At the oral argument
 26 on the motion, Green's trial counsel stipulated that Green's DNA was taken as part of P&P's
 27 administrative function, not at the request of law enforcement, and counsel agreed that an
 28 evidentiary hearing was not needed because the motion turned on "a question of law" only. ECF

1 No. 16-1 at 3. Thereafter, the state court denied the motion to suppress based on the good faith
2 exception. ECF No. 16-2. However, the state court explained that “if it came to light that . . . the
3 detectives contacted P&P in some manner and tried to obtain this sample for . . . purposes of an
4 investigation . . . , that might change things.” ECF No. 16-1 at 9.

5 Two years later, Green moved for reconsideration regarding the suppression of the DNA
6 evidence, explaining that a police officer’s report was obtained through discovery, which
7 indicated that one of 31 investigative leads that was followed was: “files of all sex offenders
8 currently on parole or probation [were] reviewed over at the parole and probation [office] along
9 with briefings to them for potential suspects.” ECF Nos. 20-5 at 6; 20-17 at 11. The prosecution
10 opposed the motion to reconsider and submitted an affidavit from a P&P supervisor saying that
11 he wrongly believed Green’s DNA was supposed to be collected based on his other conviction
12 and that it was not collected on behalf of law enforcement. ECF No. 20-11 at 11. An oral
13 argument was held on the motion for reconsideration, and the court denied Green’s request for an
14 evidentiary hearing to further explore the connection between law enforcement and P&P. ECF
15 No 20-18 at 11. The state court explained that (1) an evidentiary hearing was previously waived,
16 (2) Green’s prior trial counsel had previously taken the position that “the taking of the DNA
17 sample wasn’t intentional, it wasn’t on behalf of or at the behest of any . . . detective,” (3) the
18 caselaw did not require an evidentiary hearing “without a threshold showing of some connection
19 or nexus between the illegal search and the subsequent prosecution,” (4) there was not a
20 sufficient showing of a change in circumstance from 2005 to warrant the need for an evidentiary
21 hearing, and (5) Green did not present “anything beyond a negligent or inadvertent act by the
22 Parole and Probation officer to take the sample,” so the good faith exception still applied. *Id.* at
23 11–13.

1 Following his trial, Green raised this issue in his direct appeal, and the Supreme Court of
2 Nevada reviewed the issue before denying Green's appeal. ECF No. 23-12 at 4-7.

3 Although the state court denied Green's request for an evidentiary hearing on his motion
4 for reconsideration, Green fails to demonstrate that he did not have a full and fair opportunity to
5 litigate his Fourth Amendment claim in state court under *Stone*. Indeed, Green's motion to
6 suppress was briefed and argued, Green's motion for reconsideration was briefed and argued,
7 and Green's appeal to the Supreme Court of Nevada was briefed and thoroughly considered. *See*
8 *Terrovona v. Kincheloe*, 912 F.2d 1176, 1178-79 (9th Cir. 1990) (noting that the opportunity for
9 full and fair litigation "also consider[s] the extent to which the claims were briefed before and
10 considered by the state trial and appellate courts"); *Abell v. Raines*, 640 F.2d 1085, 1088 (9th
11 Cir. 1981) (finding that the petitioner was afforded an opportunity for full and fair litigation, in
12 part, because "[t]he opinion of the Arizona Court of Appeals is four pages long, and it clearly
13 indicates that appellant's contentions were carefully considered and squarely rejected").

14 Although Green never received an evidentiary hearing on his suppression issue, as the
15 state court explained at the hearing on his motion for reconsideration, an evidentiary hearing had
16 been previously waived by Green and was unwarranted given that Green failed to demonstrate a
17 sufficient change in circumstances from 2005. Green had shown only that law enforcement had
18 generally contacted P&P as part of their larger investigation, not that law enforcement instructed
19 P&P in any way to dishonestly collect Green's DNA. *See Mack*, 564 F.2d at 901 (finding that the
20 petitioner was afforded an opportunity for full and fair litigation even though the state court
21 refused to hold an evidentiary hearing, explaining, in part, that "the opportunity to litigate is
22 broader than the evidentiary hearing"); *Locks v. Sumner*, 703 F.2d 403, 408 (9th Cir. 1983)

23

1 (finding that the petitioner had not been denied a full and fair hearing simply because the state
 2 court relied on evidence outside of an evidentiary hearing).

3 Ground 1 is dismissed with prejudice under *Stone*.

4 **B. Ground 3**

5 In ground 3, Green alleges that his right to due process was violated when the trial court
 6 failed to sever his case for trial. ECF No. 95 at 19. The respondents argue that Green failed to
 7 exhaust ground 3 as a federal claim, explaining that his direct appeal only raised the severance
 8 issue under Nevada law. ECF No. 100 at 9–11. Green replies that (1) ground 3 was clearly
 9 identified in his direct appeal to the Supreme Court of Nevada as a due process claim, which is
 10 equally protected under state and federal law, and (2) the state and federal standards for
 11 analyzing prejudice from improper joinder are the same. ECF No. 108 at 10.

12 It is true that Green referenced due process in the title of his claim in his opening brief on
 13 direct appeal to the Supreme Court of Nevada: “Failure to sever the counts/cases violated [his]
 14 right to due process.” ECF No. 23-5 at 19. But “general appeals to broad constitutional
 15 principles, such as due process, equal protection, and the right to a fair trial, are insufficient to
 16 establish exhaustion” *Hiivala v. Wood*, 195 F.3d 1098, 1106 (9th Cir. 1999). And even if the
 17 state and federal standards for analyzing prejudice from improper joinder are the same, “[t]o
 18 ‘fairly present’ his federal claim to the state courts, [the petitioner must] alert the state courts to
 19 the fact that he was asserting a claim under the United States Constitution.” *Id.* (citing *Duncan v.*
 20 *Henry*, 513 U.S. 364, 365–66 (1995)). Indeed, “[t]he mere similarity between a claim of state
 21 and federal error is insufficient to establish exhaustion.” *Id.* Accordingly, because Green cited
 22 only Nevada statutes and Nevada caselaw to support his argument before the Supreme Court of
 23 Nevada (see ECF No. 23-5 at 19–24), ground 3 is unexhausted.

1 Because Green's Second-Amended Petition contains both exhausted and unexhausted
2 claims, he has three options going forward: (1) he may submit a sworn declaration voluntarily
3 abandoning ground 3, (2) he may return to state court to exhaust ground 3, in which case his
4 federal habeas petition will be denied without prejudice, or (3) he may file a motion asking to
5 stay ground 2 while he returns to state court to exhaust ground 3. *See Rose v. Lundy*, 455 U.S.
6 509, 510 (1982) (holding that a federal court may not entertain a habeas petition unless the
7 petitioner has exhausted available and adequate state court remedies with respect to all claims in
8 the petition). With regard to option 2, I offer no assurances as to the timeliness of any future-
9 filed petition. If Green wishes to exercise option 3 to ask for a stay, he must file a motion for
10 stay and abeyance in which he demonstrates good cause for his failure to exhaust ground 3 and
11 present arguments regarding whether ground 3 is plainly meritless.

12 **IV. CONCLUSION**

13 I THEREFORE ORDER that the motion to dismiss (**ECF No. 100**) is **GRANTED** as
14 follows: (1) ground 1 is dismissed with prejudice as not cognizable under *Stone*, and (2) ground
15 3 is unexhausted.

16 I FURTHER ORDER that the motion for reconsideration (**ECF No. 96**) is **DENIED**.

17 I FURTHER ORDER that Green has until **May 10, 2024** to inform the court how he
18 wishes to proceed on ground 3 as outlined above. If Green chooses to file a motion for a stay
19 and abeyance or seek other appropriate relief, the respondents may respond according to Local
20 Rule 7-2.

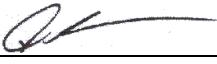
21 / / / /

22 / / / /

23 / / / /

1 I FURTHER ORDER the Clerk of Court to substitute Nethanjah Breitenbach for
2 Respondent Tim Garrett.

3 Dated: April 3, 2024.

4 
5 ANDREW P. GORDON
6 UNITED STATES DISTRICT JUDGE
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23